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IN THE

Supreme Court of the United States

STATE OF NEVADA; HUGH RICCI, P.E., in his capacity as Nevada State Engineer,
Petitioners,

and

TOWN OF FERNLEY,
Real Party in Interest,

v.

UNITED STATES OF AMERICA; AND PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada

PAUL G. TAGGART*
Deputy Attorney General

MICHAEL L. WOLZ
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1232

Counsel for Petitioners
*Counsel of Record

[Additional Counsel Listed on Inside Cover]

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ROSS E. DE LIPKAU, ESQ.
MARSHALL HILL CASSAS &
DE LIPKAU
333 Holcomb Avenue, Suite 300
Post Office Box 2790
Reno, Nevada 89505-2790
(775) 323-1601

Counsel for Real Party in Interest

QUESTIONS PRESENTED FOR REVIEW

1. Does the Ninth Circuit's rejection of basic Nevada water law principles impermissibly infringe on Nevada's sovereign right to administer its water resources through statutory schemes and judicial decisions that should be respected by federal courts?

2. Does the Ninth Circuit's misapplication of the investment-backed expectations doctrine and its implicit mischaracterization of Nevada's statutory water law as "background principles of state law," impermissibly nullify NRS 533.085 and reverse Nevada Supreme Court precedent that conclusively determined pre-statutory water rights are immune from statutory restrictions?

3. By allowing a collateral attack on a finally-determined water rights decree, does the Ninth Circuit's ruling undermine the stability of western economic systems whose prosperity rests on the conclusiveness of those decrees?

4. Does the Ninth Circuit's ruling, by characterizing the creation of water rights in the Project in a fashion that is not recognized by Nevada water law, conflict with this Court's longstanding precedent that the creation and use of water rights in a federal reclamation project are governed by state law?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners, State of Nevada and Hugh Ricci, P.E., in his capacity as the Nevada State Engineer (collectively "Nevada"), respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit entered on July 5, 2001, review of which is sought by this petition, is reported at 256 F.3d 935 (9th Cir. 2001) and is reproduced in the appendix hereto ("App.") at A-1 to A-26. The Opinion of the District Court for the District of Nevada, entered on May 14, 1999, is reproduced at App. B-1 to B-21. In addition, Nevada State Engineer's Ruling No 4116, from which the District Court administrative appeal was filed, is reproduced at App. C-1 to C-27.

JURISDICTION

The Opinion of the Ninth Circuit was entered on July 5, 2001. On November 8, 2001, the Ninth Circuit denied the State Engineer's petition for rehearing and for *en banc* review. App. D-1 to D-3.

This is an appeal from a decision of the Nevada State Engineer regarding water rights that were adjudicated by the federal district court in the *Orr Ditch* decree. *United States of America v. Orr Water Ditch Co., et al.*, In Equity Docket No. A-3 (D. Nev. 1944) (*Orr Ditch* decree) (App. E-1 to E-19). The district court's jurisdiction over the appeal vested pursuant to its continuing jurisdiction over the *Orr Ditch* decree. *United States of America v. Orr Water Ditch Co.*, 914 F.2d 1302, 1306-10 (9th Cir. 1990), *cert. denied*, 498 U.S. 817 (1990). Jurisdiction of the Ninth Circuit was based upon 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Ninth Circuit decision is the latest in a series of decisions by that court that have incrementally eroded this Court's ruling in *Nevada v. United States*, 463 U.S. 110 (1983). Through litigation that was resolved in *Nevada v. United States*, the United States and the Pyramid Lake Paiute Tribe of Indians (Tribe) failed in their attempt to acquire an additional water right for a tribal fishery through the reallocation of water rights that had been decreed in the *Orr Ditch* decree.[1] The Tribe and the United States had sought to have part of Claim 3 in the *Orr Ditch* decree moved from the Project to Pyramid Lake.[2] This Court rejected that attempt because the *Orr Ditch* decree was a final determination of the United States' right to water and modification of the *Orr Ditch* decree would violate the principles of res judicata. The Court stated:

> We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West. . . .
>
> . . . .
>
> [T]he Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in

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[1] The United States filed an action in 1913 to quiet title to all water rights from the Truckee River in the Newlands Project area. The resulting legal activity became known as the *Orr Ditch* litigation. In 1944 the District Court entered its final decree. *Nevada v. United States*, 463 U.S. at 115-18. With respect to the waters of the Carson River, a similar quiet title action was begun by the United States in 1925. A final *Alpine* decree for the Carson River was entered by the District Court in 1980. *United States of America v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983).

[2] Claim 3 in the *Orr Ditch* decree grants water to the United States for the Project based on efforts the United States initiated in 1902. App. E-4 to E-5.

> irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Nevada v. United States, 463 U.S. at 121-26.

When the United States and the Tribe lost their attempt to reallocate Claim 3 water to Pyramid Lake through the *Nevada v. United States* litigation, they began an effort to challenge every water right in the Project based on the state law principles of forfeiture, abandonment, and lack of perfection. If these challenges are successful, potentially thousands of acre-feet of water that are currently allocated under Nevada law and the *Orr Ditch* decree for the Project will be declared void, and that water will flow to Pyramid Lake. In any event, Nevada water law should govern the Tribe's and the United States' forfeiture, abandonment, and lack of perfection challenges. The Ninth Circuit misinterpreted Nevada water law in a fashion that facilitates the Tribe and the United States' efforts to succeed in voiding thousands of acre-feet of water rights in the Project.

This case stems from decisions made by the Nevada State Engineer on applications filed by the Town of Fernley, Nevada (Fernley), to change the manner and place of use of approximately 280 acre-feet of water that had been decreed under Claim No. 3 of the *Orr Ditch* decree for the Project.[3]

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[3] Fernley desired to change the manner of use of the decreed water rights from the decreed use of irrigation, storage, power, domestic, and other purposes to municipal use and to change the place of use to the

Fernley is a successor in interest to decreed water rights that are part of Claim 3. The United States and the Tribe protested Fernley's application pursuant to Nevada Revised Statute (NRS) 533.365, on a variety of grounds, including their assertions that the underlying water rights have been abandoned or forfeited. App. C-1 to C-5. After conducting a public administrative hearing, the State Engineer issued Ruling 4116, approving Fernley's application. App. C-1 to C-27.

The significance of Ruling 4116 to this petition was the State Engineer's determination that Fernley's water rights were not subject to Nevada's statutory forfeiture provision, NRS 533.060(2),[4] because a savings provision in NRS 533.085[5] protects all water rights from forfeiture that were *initiated* in accordance with Nevada law before March 22, 1913. App. C-7 to C-9. While recognizing a previous Ninth Circuit ruling that held Claim 3 of the *Orr Ditch* decree did not *vest* in 1902, the State Engineer determined

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Fernley Utilities water service area.

[4] NRS 533.060 was amended in 1999, but those amendments do not apply to the applications pending in this litigation. Act of June 8, 1999, ch. 515, § 7(1), 1999 Nev. Stat. 2630, 2634. The former version of NRS 533.060 which applies to this appeal, and all the applications to change Project water rights that are pending before the State Engineer provides, in pertinent part, that if the owner of a water right in Nevada:

> [F]ail[s] to use the water . . . for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights . . . and privileges appurtenant thereto theretofore acquired.

Id. at § 3(2), 1999 Nev. Stat. at 2631.

[5] NRS 533.085 provides that:

> Nothing contained in this chapter shall impair the vested rigl of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Fernley's water right was *initiated* in 1902 by the United States and Fernley had acquired part of that Claim 3 water right. *Id.*

Whether Fernley's water rights are subject to forfeiture or abandonment under Nevada law is critical because forfeiture is much easier to prove than abandonment. Under Nevada law, forfeiture can be based solely on five successive years of nonuse, while the proponent of abandonment must prove the owner of a water right had the intent to abandon the water right. *In re Manse Spring*, 108 P.2d 311, 315 (Nev. 1940). If Fernley's water rights are determined to be subject to forfeiture, that holding will support the conclusion that all Project water rights initiated through Claim 3 of the *Orr Ditch* decree are subject to forfeiture. Then the Tribe's burden of proof to invalidate potentially thousands of acre-feet of water rights in the Project will be significantly less difficult.

The United States and the Tribe perfected an appeal from Ruling 4116 to the District Court. The District Court, sitting as the *Orr Ditch* decree court with continuing jurisdiction over *Orr Ditch* decree matters, affirmed the State Engineer's ruling. App. B-1 to B-21. The District Court with the most intimate understanding of the origins of the *Orr Ditch* decree determined that Fernley's water right was initiated prior to March 22, 1913, because the first act of appropriation of that water right was taken in 1902 when the United States made a claim for water for the Project. App. B-6. This fact, according to the District Court, was reflected in the 1902 priority for Claim 3 that was granted in the *Orr Ditch* decree. *Id.* The *Orr Ditch* decree contains a 1902 priority date for Fernley's water right because, based upon the relation back theory under Nevada water law, the *Orr Ditch* Court determined the initial step of appropriation for Fernley's water right occurred in 1902. App. E-4 (*Orr Ditch* decree stating priority date for Claim 3 is 1902); *Nevada v. United States*, 463 U.S. at 117 (stating the *Orr Ditch* decree determined Claim 3's priority date to be 1902). The District Court also ruled that the doctrine of res judicata estopped

the United States and the Tribe from challenging the date when Project water rights were initiated. App. B-12.

In its analysis the District Court drew an ingenious analogy between a water right adjudication and a line of water users. App. B-7. Under this analogy, each water right owner stands in line, and their place in line is reflected by their seniority, called a priority date, and that place in line is protected by a decree. The District Court commented that under Nevada water law, NRS 533.085, only the persons in line after March 22, 1913, would have water rights that are subject to forfeiture. App. B-9, B-10. Through Claim 3 of the *Orr Ditch* decree, the United States obtained a place in line as of 1902 for the Project. Project water right owners who acquired their rights from the United States stand in the place in line where the United States previously stood. App. B-10. According to the District Court, since Fernley's right was acquired from Claim 3, it stands in line where the United States stood with a water right that was initiated in 1902. *Id.* Therefore, the District Court concluded Fernley's water right could not be subject to forfeiture under Nevada law. App. B-6.

The United States and the Tribe perfected an appeal from the District Court Ruling to the Ninth Circuit. The Ninth Circuit reversed the District Court's decision regarding the application of Nevada's forfeiture statute, relying principally on the following language of *United States of America v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1496 (9th Cir. 1993) (*Alpine III*):

> The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in *Manse Spring* that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source. Accordingly, with the

> purpose of the statute in mind, it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land.

The Ninth Circuit interpreted this "two sets of rights" holding regarding the vesting date of Project water rights also governs the initiation date of Project water rights. App. A-13. The Ninth Circuit held that Fernley's water right was not initiated on the date the United States took the first steps to appropriate Claim 3 water for the Project but when Fernley's Claim 3 water right was acquired by its predecessor in interest from the United States. App. A-14. According to dissenting Circuit Judge Noonan, the Ninth Circuit's ruling "silently but effectively departs from what the Supreme Court of the United States has already determined [in *Nevada*]," and "misinterprets *Alpine III*, Nevada law, and what is at least implicit in *Nevada v. United States*." App. A-24.

REASONS FOR GRANTING THE PETITION

Since Nevada's enactment of a statutory water appropriation system in the early 1900s, Nevada's legislature made clear that water rights that vested or were initiated before enactment of the statutory system were exempt from any statutorily-adopted restrictions. NRS 533.085(1). Pre-statutory rights are the oldest and most important water rights in Nevada. The Nevada Supreme Court has steadfastly protected pre-statutory rights from restrictions in the statutory system to avoid constitutional takings concerns. *In re Manse Springs*, 108 P.2d at 315-16. The Ninth Circuit has now renounced the long-adhered to efforts of Nevada's Legislature and Supreme Court by announcing a rule that makes all pre-statutory water rights in Nevada subject to Nevada's statutory appropriation system.

Allowed to stand, the Ninth Circuit ruling turns Nevada's water law on its head. Nevada has the sovereign right to regulate the administration of water rights on all

lands in Nevada without interference from the federal government. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935). Nevada made the rules that apply to water administration and a federal court should not strip Nevada of that sovereign right by fundamentally altering those rules. This Court should grant certiorari to protect Nevada's sovereign control over its water resources.

The Ninth Circuit has also allowed a collateral attack on a water right decree that this Court expressly ruled was immune from such attacks. *Nevada v. United States*, 463 U.S. at 145. A ruling that was necessarily determined in the decree, the date of initiation of a water right, has been changed by the Ninth Circuit. All the policies supporting res judicata are essential to the water appropriation system in the West because once water rights are finally determined, collateral attack undermines the stability of economic systems whose prosperity rests on the certainty of those water rights. This Court should grant certiorari to correct this serious misstep that opens the door to collateral attacks on long-settled water right decrees and economic systems in the West.

Finally, this Court should grant certiorari because the Ninth Circuit ruling applies special rules to a federal reclamation project that are expressly excluded by this Court's precedent. Allowing new water law rules to be forged in a reclamation project, separate from those announced by state legislatures, is a far-reaching departure from settled law and undermines the stability of water rights in reclamation projects across the West.

I. THE NINTH CIRCUIT'S REJECTION OF BASIC NEVADA WATER LAW PRINCIPLES IMPERMISSIBLY INFRINGES ON NEVADA'S SOVEREIGN RIGHT TO ADMINISTER ITS WATER RESOURCES THROUGH STATUTORY SCHEMES AND JUDICIAL DECISIONS THAT SHOULD BE RESPECTED BY FEDERAL COURTS.

The Ninth Circuit interpreted NRS 533.085(1), which excludes water rights "initiated" prior to 1913 from

Nevada's forfeiture statute, to be inapplicable to rights acquired in the Project from the United States. This holding was made even though the United States had initiated those rights in 1902. In so doing, the Ninth Circuit blatantly nullified Nevada law, and its decision is clearly erroneous. This Court should therefore grant certiorari to review this misinterpretation of Nevada law. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (This Court should grant certiorari solely to review what is asserted to be a misinterpretation of state law by a Court of Appeal "where the alternative is allowing blatant federal-court nullification of state law."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (This Court has "the authority to differ with the lower federal courts as to the meaning of a state statute.").[6] In addition, no deference need be afforded the Ninth Circuit's interpretation of NRS 533.085(1), and the concept of deference to a court of appeal's interpretation of state law in no way bars or advises against granting certiorari. *Leavitt*, 518 U.S. at 137.

The Ninth Circuit held that NRS 533.085(1) could not be applied to anyone who acquired rights in the Project from the United States after 1913 since it did "not make sense to read the term 'initiated' to refer to 1902, the date the United States initiated the water rights for the entire Newlands Project." App. A-12, A-13. In so holding, the Ninth Circuit nullified state law and stripped numerous property rights in Nevada of a significant statutory protection.

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[6] In fact, it has long been the case that the Court will review decisions of the Courts of Appeal where:

> [T]here is "plain" error, *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); the view of the lower court is "clearly wrong," *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); or the construction [of state law] is "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), or "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-487 (1949).

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 n.9 (1985).

A. THE NEVADA LEGISLATURE'S USE OF THE TERM *INITIATED* IN NRS 533.085 REFERRED TO THE DATE THE FIRST STEP WAS TAKEN TOWARD APPROPRIATION WHICH IS IMPLICITLY REFLECTED IN A WATER RIGHT'S PRIORITY DATE.

In 1913 the Nevada Legislature enacted sweeping changes to its water law scheme by enacting a statutory appropriation system. A statutory forfeiture provision was included in the changes and provided that a surface water right would be deemed forfeited if it was not used for five successive years. The Nevada Legislature was sensitive to constitutional challenges to the new statutory water law and therefore included NRS 533.085(1) in that law to limit retroactive application of the statutory water law, including the forfeiture provision. *In re Manse Spring*, 108 P.2d 311, 315-16 (Nev. 1940). As a consequence, any surface water right that was "initiated" prior to March 22, 1913, the effective date of former NRS 533.060, is not subject to those statutes or to forfeiture.

The Ninth Circuit misinterpreted the intent of the Nevada Legislature when the legislature used the word *initiated* because the Ninth Circuit failed to attribute a meaning to the term *initiate* that is synonymous with when the first step is taken to appropriate a water right.

The word *initiate* is a term of art in western water law that is used in the application of the well-established doctrine of relation. Nevada has long recognized that a water right commences not from the date that the water right is perfected but relates back to the *first steps* taken to initiate the right. Thus the date of the first steps taken to appropriate, if the actual appropriation is pursued with reasonable diligence, becomes a water right's priority date. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-44 (1869); *Irwin v. Strait*, 4 P. 1215, 1215 (Nev. 1884).

In describing this doctrine of relation, a leading scholar in western water law confirmed that under the doctrine, "priority relates back to the time at which

acquisition of the right was *initiated*." WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, Vol. I, 383 (1971) (emphasis added). App. F-1. Further, Mr. Hutchins clarified that "the date to which the completed right related back was variously referred to as *initiation* of the claim, commencement of the appropriation, or first step in appropriating water." *Id.* at F-3 (emphasis added).

In his specific review of Nevada water law for the United States Department of Agriculture and the Nevada State Engineer in 1955, Mr. Hutchins wrote:

> Prior to the enactment of any statute prescribing a method of *initiating* an appropriative right, the *first step* in appropriating water ordinarily would be the beginning of the dam or ditch or flume, as the case may be, by means of which appropriation would be effected, and that would be the date of *initiating* the appropriation for the purpose of the doctrine of relation.

WELLS A. HUTCHINS, THE NEVADA LAW OF WATER RIGHTS 16 (1955) (emphasis added). App. G-1.

Given these authorities, it is clear that the meaning the Nevada Legislature intended when it used the term "initiated" was synonymous with when the first steps were taken to appropriate a water right. The statute was intended to protect anyone who had begun the process of acquiring a water right under the pre-statutory scheme but had not yet perfected that water right on March 22, 1913. *See Town of Eureka v. State Engineer*, 826 P.2d 948 (Nev. 1992) (forfeiture statutes should be construed narrowly because "the law disfavors a forfeiture"). *See also Honeywell v. United States*, 661 F.2d 182, 186 (9th Cir. 1981) (as a general rule, grandfather clauses should be narrowly construed). It is also clear the protection from forfeiture carried on with the transfer of the water right to subsequent holders. *In re Manse Spring*, 60 Nev. at 314, 316.

Since the determination of a priority right is dependent on the first steps taken toward beneficial use and the diligent application of effort toward actual use of water, a priority date, by definition, reflects the date of initiation. Under Nevada water law, when a court has determined that a water right has a priority date prior to March 22, 1913, that water right must have been initiated prior to March 22, 1913, for the purposes of NRS 533.085, and is not subject to forfeiture. This interpretation of Nevada water law was confirmed by the *Orr Ditch* Court when it held that "the word 'priority' means the time when the water right was initiated." App. E-11 to E-12.

When the Ninth Circuit distinguished between the priority date for Claim 3 and the date of initiation of all of the Project water rights under contracts that were conveyed from Claim 3 by the United States, this Court fundamentally misconstrued the meaning of NRS 533.085.[7] This reasoning indicates any water right in Nevada that was initiated before 1913, but was conveyed after 1913, would not enjoy the benefit of a pre-1913 initiation date.

B. THE NINTH CIRCUIT INCORRECTLY INTERPRETED NRS 533.085 IN A FASHION THAT CONFLICTS WITH NEVADA SUPREME COURT PRECEDENT.

Certainly no presumption of validity should be given the Ninth Circuit's decision here since its interpretation of NRS 533.085(1) is inconsistent with the interpretation by two Judges of the United States District Court for the District of Nevada as well as the Nevada State Engineer. App. B-19 (*Orr Ditch* decree District Court rejecting "two sets of rights concept"); *United States v. Alpine Land & Reservoir*, 27 F. Supp. 2d 1230, 1241 (D. Nev. 1998)

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[7] *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (A federal court may adopt such a narrowing construction of a state statute if the statute is "'readily susceptible' to the limitation," but a federal court may not "*rewrite* a state law to conform it to constitutional requirements.").

(*Alpine* decree District Court expressing disagreement with "two sets of rights concept"); App. C-7 to C-9 (State Engineer rejecting two sets of rights concept). The greater expertise in interpreting Nevada law must certainly be deemed to lie with those judges and agencies within Nevada who deal regularly with Nevada's water law rather than with the Court of Appeals panel consisting of judges from California and Arizona. *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (Panel of Circuit Judges from Oklahoma, Colorado and Kansas has no greater expertise in interpreting Utah law than District Court or the Supreme Court).

Given the long history of the doctrine of relation in Nevada, it is clear that the Legislature, which must be presumed to have been aware of the law existing at the time of the passage of NRS 533.085,[8] was specifically referring to the doctrines of relation when referring to the initiation of a water right. The term "initiation" simply has no meaning independent of the doctrine of relation back. As was noted by Judge Noonan in his dissent:

> It makes perfect sense for the Nevada legislation to protect the Nevada individuals for whom the United States acted. It makes no sense to suppose with the majority that initiation of appropriation means one thing for purposes of priority and a very different thing for purposes of protection from forfeiture under § 533.085.

App. A-24.

When the United States conveyed its water rights to Project farmers through the execution of contracts, farmers received what the United States had, a water right that had been initiated in 1902 and was not subject to forfeiture. *See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987) ("the prior owners must be understood to have

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[8] *Starlets Int'l v. Christensen*, 801 P.2d 1343, 1344 (Nev. 1990).

transferred their full property rights"). The Nevada Supreme Court in *In re Manse Spring*, 108 P.2d 311 (Nev. 1940), made this perfectly clear. The court specifically held that a water right initiated or vested prior to the enactment of Nevada's forfeiture statute in 1913 is expressly excluded from that statute even after the right has been acquired by someone other than the original appropriator. The Nevada Supreme Court stated:

> We direct our attention at this point to a consideration of the question of whether or not by invoking the provisions of section 8 the rights of respondents to the waters of Manse springs, *which admittedly had vested in the predecessor in interest of the respondents long prior to the enactment of said 1913 statute*, would be affected or impaired. . . . The trial court held that to apply the terms of section 8 would have the effect of impairing rights to the waters of Manse springs which had vested prior to enactment of the 1913 statute, and therefore said section should be excluded; that rights acquired before 1913 could only be lost in accordance with the law in existence at the time of the enactment of said 1913 statute, namely, intentional abandonment.

Id. at 316 (emphasis added). The issue here, as it was in *Manse Spring*, is not when the individual farmers acquired their rights from the United States, but when the right was first initiated by their predecessor in interest, the United States. There is simply no dispute that the rights at issue were initiated by the farmers' "predecessor in interest . . . long prior to the enactment of said 1913 statute." *Id.* In acquiring rights from the United States the farmers received everything the United States had, including the 1902 initiation and priority dates.

1. The Ninth Circuit Gives Forfeiture Law Retroactive Effect.

The Nevada Supreme Court made clear in *Manse Spring* that Nevada's forfeiture statute was not intended to have retroactive effect. *In re Manse Spring*, 108 P.2d at 315-16. The Ninth Circuit gave the forfeiture statute retroactive effect by applying it to a water right that had been initiated prior to March 22, 1913.

There is no legal basis for the Ninth Circuit's conclusion that it does "not make sense to read the term 'initiated' to refer to 1902, the date the United States initiated the water rights for the entire Newlands project" since "[s]uch a reading would protect water-right holders who had done nothing at all to acquire water rights as of the date of the forfeiture statute." App. A-12, A-13. The Nevada Supreme Court made it clear in *Manse Spring* that a successor in interest will in fact benefit from NRS 533.085 even though he or she acquired those rights after the date of the forfeiture statute. *In re Manse Spring*, 108 P.2d at 315-16. The Ninth Circuit ruling directly conflicts with Nevada Supreme Court precedent.

2. Reliance On Appurtenance Is Misplaced.

The Ninth Circuit also erred in differentiating *Manse Spring* from the facts of this case on the basis that the water rights at issue in *Manse Spring* had remained appurtenant to a particular parcel of land. App. A-14, A-15. There is no language in *Manse Spring* that gives any indication that the appurtenance of the water to a given piece of land had any bearing in the decision regarding the initiation date for the purpose of NRS 533.085.

In *Manse Spring*, had an intervening owner of the rights sought and received permission from the State Engineer to transfer those rights, the initiation date of those rights would still have related back to the first acts to divert the water. The holding of *Manse Spring* would have been no different even if a transfer had made the water appurtenant

to a different parcel of land. Appurtenance is not a legitimate basis on which to differentiate *Manse Spring* from the case at hand.

Nevada urges this Court to grant certiorari in order to correct the nullification of Nevada law. By applying a provision of Nevada's statutory appropriation system to a pre-1913 water right, the Ninth Circuit has undermined Nevada's sovereign right to define the rules that govern water appropriation in her borders. Federal courts should respect that sovereignty.

II. THE NINTH CIRCUIT'S MISAPPLICATION OF THE INVESTMENT-BACKED EXPECTATIONS DOCTRINE AND ITS IMPLICIT MISCHARACTERIZATION OF NEVADA'S STATUTORY WATER LAW AS "BACKGROUND PRINCIPLES OF STATE LAW," IMPERMISSIBLY NULLIFIES NRS 533.085 AND REVERSES NEVADA SUPREME COURT PRECEDENT THAT CONCLUSIVELY DETERMINED PRE-STATUTORY WATER RIGHTS ARE IMMUNE FROM STATUTORY RESTRICTIONS.

In interpreting the *initiated* language in NRS 533.085, the Ninth Circuit referred to the investment-backed expectations doctrine. Specifically, the Court stated: "In the jargon of modern takings law, if a water-right holder had an investment-backed expectation as of the effective date of the statute, that holder's water right was exempt from forfeiture." App. A-12. The Ninth Circuit then stated "there is no reason to protect individuals who began the process of acquiring water rights after the effective date of the statute, because they did so with notice that any water right they acquired would be subject to forfeiture." App. A-13. Dissenting Judge Noonan aptly referred to this insertion of the investment-backed expectations doctrine as follows:

> The majority engages in the speculation that the purpose of the Nevada anti-forfeiture statute was to exempt "investment–backed expectations." Nothing in the language of the

> statute evinces this purpose. Where initiation of appropriation is begun there is no investment. There is merely an assertion of title. As the anti-forfeiture statute protects both vested rights and the first tentative step to vesting, there is no reason to attribute to the statute a purpose to protect investment.

App. A-23, A-24.

A. THE NINTH CIRCUIT'S APPLICATIONS OF THE INVESTMENT-BACKED EXPECTATIONS DOCTRINE IS DIRECTLY CONTRARY TO THIS COURT'S RULING IN *PALAZZOLO V. RHODE ISLAND*, 533 U.S. 606 (2001).

The Ninth Circuit ruled in this case that if Project water right owners acquired water rights through contracts with the United States after 1913, their rights are protected from neither statutory forfeiture, nor by logical extension, the other provisions of Nevada's statutory water law. According to the reasoning of the Ninth Circuit, Project water right owners who acquired water rights after 1913 are not entitled to rely on NRS 533.085 to protect their rights from statutory restrictions because anyone who acquired a water right from the United States after 1913 "did so with notice that any water right they acquired would be subject to forfeiture." App. A-13.

This Court struck down identical reasoning in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo*, the Rhode Island Supreme Court announced a rule that, "a purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 613. The Rhode Island rule, according to this Court, was based in part on the theory that subsequent owners cannot claim any injury from lost value because they purchased or took title with notice of a statutory limitation. *Id.* This Court commented that if a post-enactment transfer of title would absolve the State of its obligation to defend any action

restricting land use, a State would be allowed "to put an expiration date on the Takings Clause." *Id.* Accordingly, this Court held that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a constitutional regulation "by mere virtue of the passage of title." *Id. See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987) (if a state could not deprive the prior owners without compensation, "the prior owners must be understood to have transferred their full property rights," including the right of compensation, in conveying their property interest).

The *Palazzolo* decision expressly rejects the Ninth Circuit's reasoning in this case. It is clear that the Nevada Legislature did not intend the statutory forfeiture statute to have retroactive effect because retroactive application of the statute would raise constitutional concerns. *In re Manse Spring*, 108 P.2d 311, 315-16 (Nev. 1940). The Ninth Circuit ruled that constitutional concerns are not raised by the application of the forfeiture statute against Project water right holders who acquired their rights from the United States after 1913 because they were on notice of the forfeiture statute when they acquired rights. In effect, the Ninth Circuit ruled that Nevada's statutory appropriation system became part of the *background principles of state law* for farmers who acquired water rights after 1913.

Consistent with *Palazzolo,* however, the constitutional concerns raised by retroactive application of the forfeiture statute were not resolved by a subsequent purchaser's notice of the forfeiture statute, or *by mere virtue of the passage of title*. And the statutory appropriation system did not become part of the background principles of the law in Nevada. *See Palazzolo*, 533 U.S. at 614-15.

Further, the Ninth Circuit's ruling applies equally to all water rights in Nevada that were vested or initiated before 1913. Upon conveyance of those rights after 1913, the rights would become automatically subject to forfeiture and all the other provisions of Nevada's statutory water law. This result places "an expiration date on the Takings

Clause" by allowing pre-1913 rights to be subject to post-1913 statutes "by mere virtue of the passage of title." This result inappropriately allows post-1913 statutes to apply to pre-1913 water rights in Nevada and is completely contrary to this Court's ruling in *Palazzolo* and the Nevada Supreme Court's ruling in *Manse Spring*. This Court must grant Nevada's petition to correct this erroneous restatement of Nevada water law or, at a minimum, direct the Ninth Circuit to review its decision in light of the ruling in *Palazzolo*.

B. MISAPPLICATION OF INVESTMENT-BACKED EXPECTATIONS DOCTRINE.

The Ninth Circuit also misapplied the investment-backed expectations doctrine because it relies on a flawed premise that farmers who executed their contracts should have known they were *not* getting all the attributes of the water rights the United States conveyed, particularly the immunity from statutory forfeiture.

Application of the investment-backed expectations doctrine in this fashion cuts directly against statements by the author of that doctrine, Justice Brennen, that "the thousands of small farmers in northwestern Nevada can rely on specific promises made to their forebears two and three generations ago, and solemnized in a judicial decree." *Nevada v. United States*, 463 U.S. at 145. As argued above, the right the United States had was not subject to forfeiture. The reasonable expectation of farmers was that the water rights they were acquiring from the United States included all of the rights held by the United States, including the initiation date of 1902 and the protection against statutory forfeiture. *See Nollan*, 483 U.S. at 834 n.2 (prior owners must be understood to have transferred their full property rights).

Accordingly, the concept of investment-backed expectations in fact supports the position that the water rights at issue here are not subject to the forfeiture statute since a successor in interest of a water right acquires not only the right to use the water but the priority or initiation

date as well. *In re Manse Spring*, 60 Nev. at 316. As a consequence, farmers must be deemed to have reasonably expected that their rights were initiated prior to 1913 by their predecessors in interest, the United States, a fact recognized in the *Orr Ditch* decree and protected from collateral estoppel based on the holding in *Nevada v. United States*. It is completely unfair to assume that when farmers executed their contracts they were on notice of the Ninth Circuit's "two sets of rights" fallacy that was announced decades later in *Alpine III*.

C. APPLICATION OF INVESTMENT-BACKED EXPECTATIONS TO NEVADA WATER LAW WAS INAPPROPRIATE.

Despite the fact the parties in this appeal never addressed the investment-backed expectations concept in their briefs, the Ninth Circuit applied the doctrine. *See Dolan v. The City of Tigards*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003 (1992). There are no decisions of the Ninth Circuit, the Nevada Supreme Court, or any other western state court that have applied the doctrine of investment-backed expectations to water law. It was inappropriate for the Ninth Circuit to incorporate this doctrine into Nevada water law. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

As stated above, the term initiated in NRS 533.085 had a very specific meaning in Nevada water law and western water law. Since this meaning is clear, the Ninth Circuit should not have diverged from that clear meaning to effectively rewrite the statute through the use of a foreign legal construct. *Id.* Finally, use of this doctrine in water law can have wide-ranging, detrimental implications that undermine essential tenets of western water law. After this ruling, a person who acquires an unperfected water right does not acquire all the legally protected characteristics of the right that sellers hold. For instance, through the application of this doctrine to Nevada water law, a water right in Nevada that was clearly vested or initiated before 1913 can lose its protection from the statutory forfeiture

provision solely through a post-1913 conveyance. Since this result announces a new rule to govern Nevada water rights but is contrary to the intent of the Nevada Legislature, this Court should grant Nevada's petition and review the decision of the Ninth Circuit.

III. BY ALLOWING A COLLATERAL ATTACK ON A FINALLY-DETERMINED WATER RIGHTS DECREE, THE NINTH CIRCUIT'S RULING UNDERMINES THE STABILITY OF WESTERN ECONOMIC SYSTEMS WHOSE PROSPERITY RESTS ON THE CONCLUSIVENESS OF THOSE DECREES.

Despite the many equitable arguments the Tribe has made to protect Pyramid Lake, the principles of this Court's precedents and Nevada water law must govern the water rights in the *Orr Ditch* decree. For this reason, the *Nevada v. United States* Court ruled against the equitable arguments of the Tribe because they were outweighed by the res judicata principles upon which *Orr Ditch* water rights are based. *See Nevada v. United States*, 463 U.S. at 145 (stating that "despite strong claims on the part of the Pyramid Lake Paiutes," the promises of the decree must be upheld). The Ninth Circuit's ruling in this case raises similar problems.

A. THE NINTH CIRCUIT'S RULING VIOLATES THE RES JUDICATA PRINCIPLES ANNOUNCED IN *NEVADA V. UNITED STATES*.

This Court reversed the Ninth Circuit in *Nevada v. United States* for failure to adhere to res judicata principles. The Ninth Circuit has failed again to adhere to res judicata principles by ignoring a long established principle of western water law that the priority date for a water right reflects the water rights initiation date. Once that date has been finally determined in a water rights decree, it should not be subject to collateral attack.

In *Nevada v. United States*, this Court upheld the principle that once a decree is final, it is not subject to collateral attack. One determination that was made in the *Orr Ditch* decree was that Claim 3 has a priority date of

1902. In order to determine the priority date for Claim 3, the *Orr Ditch* Court necessarily had to determine when Claim 3 was initiated because Nevada's doctrine of relation bases the priority date for a water right on the date the right was initiated. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-44 (1869). Therefore, when the *Orr Ditch* Court determined the priority for Claim 3, it necessarily determined the initiation date for Claim 3. This fact is reflected in the language of the *Orr Ditch* decree which states, "'Priority' means the time when the water right was initiated." App. E-11 to E-12. By allowing the United States and the Tribe to attack the initiation date for Claim 3 water rights, the Ninth Circuit violated this Court's proclamation that the *Orr Ditch* decree was immune from such a collateral attack.

Also, the Ninth Circuit violated the principles of res judicata by allowing the United States and the Tribe to allege Project water rights are diverted from a different source than the water rights awarded to the United States through Claim 3. As stated by the District Court:

> [R]es judicata precludes both the Tribe and the United States from arguing that the farmers should be treated as if they appropriated their water directly from the Truckee River, rather than as a transfer from the United States. As to the priority date for Project water rights, the parties could have argued, during the litigation of the United States' Orr Ditch complaint, that the court should adopt the unique legal fiction that the Project farmers had appropriated water directly from the Truckee instead of from the United States. As this legal theory was not raised during the stream adjudication determining the priority date of Project water

> rights, the parties are precluded from raising the argument in this review of transfer applications.

App. B-19.

The District Court was correct. The *Orr Ditch* Court finally decided when Project water rights were initiated. Allowing an attack on that determination violated the principles of res judicata and has destabilized the validity of all the water rights in the Project. By allowing a collateral attack, the Ninth Circuit has threatened the stability of all water right decrees that, heretofore, were not subject to collateral attack. This Court should grant Nevada's Petition for Certiorari to protect the stability of such decrees.

B. THE NINTH CIRCUIT'S "TWO SETS OF RIGHTS" CONCEPT CONFLICTS WITH THE PRINCIPLE ANNOUNCED IN *NEVADA V. UNITED STATES* THAT WATER RIGHTS INITIATED FOR THE PROJECT BY THE UNITED STATES WERE CONVEYED TO PROJECT WATER RIGHT OWNERS.

The Ninth Circuit's invention of the "two sets of rights" concept, when applied to the initiation of Project water rights, creates a result that is completely contrary to the holding in *Nevada v. United States* that only one set of rights exists in the Project and those rights were conveyed by the United States to the farmers. Since there is only one set of rights, there can be only one initiation date—1902.

In *Alpine III*, the Ninth Circuit reviewed the question of which Project water rights vested prior to 1913, thereby making them immune from forfeiture pursuant to NRS 533.085. *Alpine III*, 983 F.2d at 1496. The Ninth Circuit determined that, for the purpose of deciding when Project water rights vested, two sets of rights exist in the Project. In the case at bar, the Ninth Circuit was faced with the question when Project water rights were initiated. The Ninth Circuit erroneously determined the "two sets of rights" concept also applies to the determination of when a right was initiated. App. A-14. In other words, the Ninth

Circuit ruled Project water rights that were acquired from and initiated by the United States were not initiated by the United States in 1902.

Dissenting Judge Noonan referred to this mistake as a misinterpretation of *Alpine III*:

> [*Alpine III*] was about vesting; this court reversed the State Engineers's erroneous determination that water rights had vested in 1902. *Alpine III*, 965 P.2d 731, 738 (9th Cir. 1992). When it was brought to the court's attention that the court had said nothing about the initiation of appropriation of rights (an issue not before it), the court amended its disposition to remand the question of initiation. *Alpine III, as amended*, 983 F.2d 1487, 1496 (9th Cir. 1993).

App. A-23.

The inappropriateness of applying the "two sets of rights" concept to the initiation date of Project water rights is evidenced by this Court's statement in *Nevada v. United States*, 463 U.S. at 126, that once Project lands were acquired by settlers in the Project, "the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project." The holding indicates that the rights initiated and confirmed to the United States were conveyed to settlers who irrigated Project lands. Accordingly, the only logical conclusion is that the rights owned in the Project were initiated by the United States when it initiated the right that was confirmed to it in the *Orr Ditch* decree. Since the Ninth Circuit's ruling conflicts with the basic principle of *Nevada v. United States* and destabilizes the validity of water rights in the *Orr Ditch* decree, this Court should grant Nevada's Petition for Certiorari.

IV. BY CHARACTERIZING THE CREATION OF WATER RIGHTS IN THE PROJECT IN A FASHION THAT IS NOT RECOGNIZED BY NEVADA WATER LAW, THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S LONGSTANDING PRECEDENT THAT THE CREATION AND USE OF WATER RIGHTS IN A FEDERAL RECLAMATION PROJECT ARE GOVERNED BY STATE LAW.

A critical error made in the Ninth Circuit's decision is the holding that farmers do not own a water right that was initiated by the United States in 1902. The rights acquired by the farmers are not "akin to new rights" but are in fact rights acquired from a predecessor in interest which retain all the legal attributes of a right that was enjoyed by the previous owner. By ruling that Project rights are "akin to new rights," the Ninth Circuit invented a new type of water right that is not recognized under Nevada water law.

A. NEVADA WATER LAW GOVERNS IN RECLAMATION PROJECT.

The Reclamation Act "clearly provided that state water law would control in the appropriation and later distribution of the water" rights in a federal reclamation project. *California v. United States*, 438 U.S. 645, 664 (1978). Under Nevada water law, water rights fall in two categories, pre-statutory and statutory water rights. Pre-statutory rights are those established or initiated through Nevada's system of prior appropriation before Nevada adopted a statutory appropriation system. Statutory rights are those acquired through applications to the State Engineer under Nevada's statutory system. *See* NRS ch. 533.

B. THE "TWO SETS OF RIGHTS" CONCEPT CONFLICTS WITH NEVADA WATER LAW.

Under Nevada water law, every valid water right must fall within one of these two categories. None of the Project water right owners who acquired water rights through contracts with the United States applied for rights under Nevada's statutory system, yet they hold valid water

rights with a 1902 priority. If these had been new appropriations, as described by the Ninth Circuit's "two sets of rights" theory, the new appropriations would have required applications to be made to the State Engineer and approval be granted by him in order for the appropriation to be valid. NRS 533.325. That was never done because, clearly, these acquisitions of water from the United States were not new allocations. Project water right owners trace the origin of their water rights to Claim 3, not a permit or certificate in the State Engineer's office. Hence, the water rights in the Project are clearly pre-statutory rights because they were established through Nevada's system of prior appropriation when they were initiated by the United States, not through Nevada's statutory appropriation system.

The idea that two sets of rights exist in the Project and Project water right owners acquired a water right directly from a new source when they executed contracts with the United States is completely inconsistent with Nevada water law. On this point, both of the District Courts that review decisions regarding water rights in the Project disagree with the "two sets of rights" concept. The *Orr Ditch* Court rejected this legal fiction based on res judicata principles that preclude the United States and the Tribe from asserting that Project water rights "should be treated as if they appropriated their water directly from the Truckee River, rather than as a transfer from the United States." App. B-19. The *Alpine* Court agreed:

> [T]he court would observe that it agrees with the Engineer that there is only one set of rights on the Project. Every water right which derives from the Project was initiated by the actions of the United States beginning in 1902, when it posted notice that it was acquiring the water rights within the Lahontan Valley. . . . As to Project water, therefore, the court believes that under the relation back doctrine, the 1902 priority date

should be controlling on the issue of forfeiture.

United States v. Alpine Land & Reservoir, 27 F. Supp. 2d 1230, 1241 (D. Nev. 1998). There is no provision of Nevada water law that recognizes that a new water right is created when a contract is executed between an entity that owns a water right and another person or entity.

The only plausible explanation of the legal effect of the water right contracts between the United States and Project farmers is the United States conveyed to the farmers the interests it had in Claim 3 water rights. The United States conveyed the interest it acquired through spending millions of dollars in constructing the Project works for Claim 3 and in exchange the farmers received water rights and incurred the debt of construction. Accordingly, the farmers acquired the United States' Claim 3 right that was initiated prior to 1913 and was not subject to forfeiture.

The legal invention of two sets of rights and two separate initiation dates is incorrect because this invention for water rights in a federal reclamation project is completely foreign to Nevada water law. By allowing new federal law to forge rules that conflict with long-established state law in federal reclamation areas, the Ninth Circuit has undermined the stability of water rights in all federal reclamation projects. Accordingly, it directly conflicts with the Supreme Court precedent. *California v. United States*, 438 U.S. 645, 664 (1978).

Further, the Ninth Circuit ruling dictates the absurd conclusion that, under Nevada law, Project water rights are not currently valid because they can trace their origin to neither Claim 3 of the *Orr Ditch* decree, nor to any certificate or permit issued by the State Engineer. The absurdness of this result illustrates the clear error in the Ninth Circuit's ruling and the pressing need for this Court to grant Nevada's Petition for Certiorari.

CONCLUSION

The underlying Ninth Circuit ruling clearly misstates Nevada water law. As a result, despite this Court's protection of the *Orr Ditch* decree from collateral attack, the validity of all water rights in the *Orr Ditch* decree and the Project are now in doubt. Despite explicit rulings by the Nevada Supreme Court that water rights that vested or were initiated before 1913 are not subject to the statutory water code that was adopted in Nevada, the Ninth Circuit's ruling now makes all pre-1913 water rights in Nevada subject to the statutory water code by virtue of a mere transfer of title after 1913.

The Ninth Circuit has adopted reasoning that is rejected by every court and state official that is bound to administer water law in Nevada. Its reasoning has far reaching destabilizing effects on all water rights in the west. Federal courts should not decide, nor redefine, state water law because such action usurps a state's power to control its own water resources and undermines the years of efforts states have expended to develop effective systems for administering water rights. Accordingly, this Court should grant Nevada's Petition for Certiorari.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada
PAUL G. TAGGART*
Deputy Attorney General
MICHAEL L. WOLZ
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1232

Counsel for Petitioners
*Counsel of Record

ROSS E. DE LIPKAU, ESQ.
MARSHALL HILL CASSAS &
DE LIPKAU
333 Holcomb Avenue, Suite 300
Post Office Box 2790
Reno, Nevada 89505-2790
(775) 323-1601

Counsel for Real Party In Interest